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CHARLES ELMORE DROPLEY
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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 649

ALLIED BRIDGE AND CONSTRUCTION
COMPANY,

Petitioner,

vs.

DANVILLE SANITARY DISTRICT,

Respondent.

REPLY BRIEF FOR PETITIONER.

CHARLES P. R. MACAULAY,
Chicago, Illinois.

Attorney for Petitioner.



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MAY IT PLEASE THE COURT:

Though the respondent insists over and over again throughout its answer that the facts have been misrepresented by the petitioner, the facts as stated by the respondent are not materially different. There is no dispute that the sewer was laid at a lower level than was prescribed by the figures shown on the plans, if the figures are referable to the United States Geodetic Survey; that it was so constructed by the directions given to petitioner's workmen by the engineers in the employ of the respondent; that the expense of constructing the sewer at the lower level was greater than would have been incurred, had it been constructed at the levels prescribed by the figures on the plans, (interpreting the figures as referable to U. S. G. S.

datum). The Circuit Court of Appeals in its opinion (at the end of the paragraph entitled, "What Bench Mark Used?"), held that,

"Plaintiff had a right to believe that the elevations were fixed by a survey starting from the United States Geological Survey bench mark".

Opinion, Record page 198.

The question of law then arises whether, if the plaintiff had a right to believe that the elevations were fixed by a survey starting from the United States Geodetic Survey bench mark, the contract should be construed as authorizing the respondent to cause the sewer to be constructed at a lower elevation.

The respondent insists that the plans were not intended to conform to U. S. G. S., but were referable to a datum plane "established" by the city engineer of Danville. The making of such argument amounts to a confession of error. If the plans were in fact drawn in conformity with the so-called datum of the city engineer and if the engineers of respondent accordingly caused the sewer to be constructed in accordance with the datum of the engineer of Danville, the respondent was liable to the plaintiff, because, as the Circuit Court of Appeals, as well as the District Court, held, the plaintiff had a right to believe that the elevations were fixed by a survey starting from the United States Geodetic Survey bench mark.

The evidence that the engineers of respondent made a resurvey after the contract had been signed and before construction was commenced and discovered that the sewer would be dangerously high if it was constructed according to U. S. G. S. elevations and that said engineers then decided to cause the sewer to be constructed according to plans "corrected" for construction, was competent for the purpose of showing that the sewer was in fact laid below the level prescribed by the (U. S. G. S.) figures shown on the plans. The fact that the engineers conspired to cause

the sewer to be constructed otherwise than with reference to the United States Geodetic Survey was strong evidence that they did in fact prevent the workmen from constructing the sewer in accordance with the government bench mark. The evidence that the engineers decided, without the consent of the petitioner, to disregard the government bench mark could not have the effect of changing the obligations of the contract.

The fact that the plaintiff made no claim for excavating more soil than the contract called for cannot legally be regarded as an admission that the sewer was laid at the elevation prescribed by the plans. The plans showed the profile of the surface of the ground as being an imaginary line which was, in fact, about a foot and a half in the air above the true surface of the ground. This representation of the surface was stipulated by the contract to be only an approximation. In estimating the amount of excavating to be done, the amount of bracing necessary for the trench to hold the ground during construction, etc., the petitioner, presuming that the plans were correct, based his calculations on the supposition that the amount of soil to be excavated would be proportional to the height of the surface above the invert of the sewer indicated by the plans. The sewer was in fact constructed lower than the figures prescribed by the contract (if the figures were based on U. S. G. S. datum) and consequently the amount of excavating actually done was the same as the amount of excavating apparently called for by the plans. It is true that the sewer should have been laid at levels prescribed in accordance on the plans and that the amount of excavating done should have been less than was indicated by the plans because the surface of the ground was not as high as was shown thereon, and the plaintiff might have been technically entitled to claim that he was compelled, by the misdirection of the engineers of respondent, to dig more soil than was actually required by the contract. But since he

made his bid on the supposition that the plans were correct, he thought that he would have to excavate the amount of soil that he did excavate and, therefore, he was not disposed to claim additional compensation for excavating more than was actually required by the contract. Protecting the trench from underground water which was encountered at the lower levels was the important additional expense to which the plaintiff was put by the unlawful conduct of the engineers of respondent.

It is submitted that the secret conversations and communications between the engineers of respondent, after the signing of the contract, should not be regarded as having the effect of altering the meaning of the instrument.

It is impossible for the petitioner, having regard for the rules, to make a detailed reply to the long and argumentative answer of respondent to the petition for writ of certiorari.

Respectfully submitted,

CHARLES P. R. MACAULAY,
Attorney for Petitioner.

FILED

JAN 21 1941

CHARLES SUMNER PROPLEY
CLERK

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OCTOBER TERM, A. D. 1940.

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ALLIED BRIDGE AND CONSTRUCTION CO.,
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vs.

DANVILLE SANITARY DISTRICT,
Respondent.

**ANSWER TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SEVENTH CIRCUIT AND
BRIEF IN SUPPORT THEREOF.**

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SUBJECT INDEX.

	PAGE
Statement of Case	1
Summary of Argument	12
Argument	13
Point I	13

TABLE OF CASES.

Furness, Withy & Co. v. Yanz-Tsze Ins. Co. Asso., 242 U. S. 430 at 433	24
Layne & Bowler Corp. v. Western Well Works, Inc., 261 U. S. 387 at 392 and 393.....	24
Magnum Import Co. v. Coty, 262 U. S. 159 at 163.....	24
Southern Power Co. v. North Carolina Public Service Co., 263 U. S. 508 at 509	24



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To the Honorable Supreme Court of the United States:

The respondent respectfully shows, in answer to the petition for writ of certiorari, as follows:

I.

STATEMENT OF THE CASE.

The petitioner in its statement of the matter involved presents to this Court its theory of the evidence as a settled fact and upon such assumption urges that the Circuit Court of Appeals for the Seventh Circuit has misconstrued the contract in question. The facts as stated in the

petition are not those found by the Circuit Court of Appeals from the evidence in the record. For this reason we deem it proper to set forth the matter involved including the facts as found by the Circuit Court of Appeals and as supported by the evidence in the record.

On sheet 21 of the plans (Plaintiff's Exhibit No. 1, Record 206; Introduced in Evidence, Record 24) the horizontal scale above the word "profile" in the middle of the sheet, numbered 0 plus 00 to 18 represents the first 1800 feet of the sewer. This is likewise true of the remainder of the profile shown. Therefore, we refer to the starting point of the sewer as Station 0 plus 00. If we are referring to a point 950 feet from the beginning, we do so by using the term "Station 9 plus 50."

Webster's New International Dictionary (1913, page 570) says that "datum plane" or "datum level" are used interchangeably and mean a plane or level assumed or used as a basis of reckoning. A bench mark is a fixed object such as for example the top of a curb stone or the top of a water hydrant adopted by the surveyor or engineer. An engineer can design a sewer system and a sewer may be constructed according to such a design by using for example as a starting point or bench mark the top of a curb stone or the rim of an existing manhole cover as was the situation in this case (hereinafter shown). To this starting point or bench mark the engineer may assign an elevation based upon its height above sea level (which is U. S. G. S. datum), or an elevation based upon the bench mark's height in relation to Lake Michigan which is lake datum, or an arbitrary elevation. (Evidence, Record 97, 107.) The engineer or surveyor who makes the original survey and the design or plan may assign the starting point or starting bench mark the arbitrary elevation of 100. In such case, if the ground surface elevation thirty feet from the starting point is three feet above the start-

ing point, the elevation for such ground surface at that place will be shown as 103, and if a sewer were to be placed ten feet under such ground surface at such point thirty feet from the starting bench mark, its elevation on the plans would be shown as 93, etc.

The plans (Plaintiff's Exhibit No. 1, Record 206; Introduced in Evidence, Record 24) which were a part of the contract entered into between petitioner and respondent (Plaintiff's Exhibit No. 2, Record 206; Introduced in Evidence, Record 24) were designed by respondent's engineers, Greeley & Hansen (Circuit Court of Appeals Opinion, Record 193; Evidence, Record 92) who adopted for such design a datum plane established by the City Engineer of Danville, Illinois, the starting bench mark of which was the rim of an existing manhole located at Station 0 plus 00 on the plans (Circuit Court of Appeals Opinion, Record 194; Evidence, Record 92, 102). The sewer constructed under the contract was constructed according to the design (plans) using the datum of the design (plans), namely, the datum of the City Engineer of Danville, Illinois, the starting bench mark of which was as aforesaid the rim of an existing manhole located at Station 0 plus 00. (Circuit Court of Appeals Opinion, Record 198, 199; Evidence, Record 92, 100, 101, 102; Plaintiff's Exhibit No. 25, Record 151, 152, 153; Introduced in Evidence, Record 124.) However, the plans and design which were submitted to petitioner for its use in submitting a bid did not have a reference therein as to what datum was used in the design of the sewer or as to the starting bench mark thereof. (Circuit Court of Appeals Opinion, Record 198; Evidence, Record 92.)

Prior to entering the contract with the respondent or submitting a bid thereon, H. J. Cathroe, petitioner's vice president, obtained the plans and specifications from the office of Greeley & Hansen, respondent's engineers, exam-

ined and studied the same together with the contract, (Circuit Court of Appeals Opinion, Record 195; Evidence, Record 24, 31) and knew at that time that there was no reference in the plans to the datum or bench mark used for the design (Evidence, Record 26), but did not inquire of respondent's engineers as to what datum and starting bench mark was used for the design (Evidence, Record 32).

Petitioner's vice president then went to the construction site to investigate the character of the soil and underground conditions. Petitioner's vice president in making such investigation, without first inquiring of respondent's engineers so as to find out that the bench mark and datum of the City Engineer of Danville was used for the design of the plans, assumed that the plan was designed using datum established by the United States Geodetic Survey (hereinafter referred to as U. S. G. S. datum), and ran a survey from the U. S. G. S. bench mark on the Federal Building to the stations he had selected for test borings on the site (Circuit Court of Appeals Opinion, Record 195; Evidence Tr. 32, 37, 38). From this survey petitioner's vice president determined the surface elevation of the ground independently of the scaled surface elevation shown at the right of the profile on the plans (Circuit Court of Appeals Opinion, Record 195). Then he accepted the invert elevation (lowest point in the curvature of the lower half of the sewer pipe) shown on the plans in figures and assumed that the invert level in the plans was based on the U. S. G. S. bench mark rather than the bench mark of the City Engineer of Danville, upon which it was actually based; thirdly, he subtracted the second figure (invert elevation) from the first one (his independently obtained ground elevation), the difference constituting the depth of cut or the number of feet required to be dug in order to reach the invert level.

Using this data he drilled six test holes to what he assumed to be the invert level and petitioner claimed that in reliance upon this inspection it submitted a bid which was accepted by the respondent (Circuit Court of Appeals Opinion, Record 195; Evidence, Record 24).

From this inspection petitioner's vice president expected to find water in the first thousand feet and a dry trench in the remainder of the sewer. Petitioner claimed that it encountered more water in the trench in construction than it anticipated as a result of its vice president's inspection which was based upon his assumption of a bench mark and datum which were not actually used in the design of the plans or the construction of the sewer (Circuit Court of Appeals Opinion, Record 196; Evidence, Record 28).

It might be well to here point out that the United States Geodetic Survey or U. S. G. S. is actually height above sea level and therefore that the terms "U. S. G. S. datum" and "above sea level" are synonymous. Therefore, in the petition when the petitioner refers to the term "above sea level" it refers to U. S. G. S. datum.

At the outset of construction of the sewer it was called to the attention of Sick, respondent's resident engineer on the job, representing Greeley & Hansen, that U. S. G. S. datum varied with the datum of the City Engineer of Danville, Illinois, used in the design of the plans and the construction of the sewer approximately 1.16 feet (Circuit Court of Appeals Opinion, Record 196, 197, 200; Evidence, Record 100, 101; Plaintiff's Exhibit No. 25, Record 151, 152, 153; Introduced in Evidence, Record 124). Petitioner's vice president toward the end of the construction period made a re-check of his survey and found that the invert level of the sewer was 1.16 feet lower than he had assumed the plans to show upon his applying U. S. G. S. datum to the plans rather than the actual datum

used in the construction and design (Circuit Court of Appeals Opinion, Record 196; Evidence, Record 30). During the construction respondent's engineers directed the depth at which the sewer was constructed by placing grade stakes along the sides of the sewer trench upon which were figures showing the depth of the cut to be made at the point where the grade stakes were placed. (Circuit Court of Appeals Opinion, Record 199.) If U. S. G. S. datum had actually been used in the design of the plans and the construction of the sewer, the cut would have remained the same as it would have been necessary to not only correct the figures as to the invert elevation but the ground surface elevation and all other related objects as is properly illustrated by the Circuit Court of Appeals in its Opinion (Record 200).

Thus as we have demonstrated above as shown by the evidence, the sewer was designed on the plans using the datum of the City Engineer of Danville, Illinois and this datum was the datum actually used in construction. Thus, the sewer was constructed in substantial conformity with the plans and specifications all as properly found by the Circuit Court of Appeals (Circuit Court of Appeals Opinion, Record 199, 200, 201, 202). It must therefore become apparent that petitioner's claim that the sewer was lowered by respondent's engineers is not substantiated by the facts but is prompted by the inspection made by petitioner's vice president wherein he used a datum and starting bench mark therefore which was not the datum and starting bench mark used in the design or in the construction and which varied by approximately 1.16 feet from that used in the design and construction.

On page 3 of the petition under petitioner's statement of the matter involved in the paragraph beginning with the words "Both parties" there are two statements to the effect that "respondent's engineers, without the knowledge

of the petitioner, directed the petitioner to construct the sewer 1.12 feet below the levels shown in the plans." This same statement is made in the second paragraph on page 4 of the petition, in substance in the paragraph beginning with the words "After the" on page 5 of the petition, under its second "question presented" on page 9 of the petition, and in substance under its argument in the paragraph beginning with the words "how much" on page 11 of the petition. These statements are all erroneous statements of fact. We have shown above that the engineers of respondent directed the construction of the sewer according to the datum used in the plans which was the datum of the City Engineer of Danville, Illinois. This is substantiated by the uncontradicted testimony of the witness, Nemoyer, that "respondent's engineers knew the bench mark to which the original preliminary surveys were tied onto and it was the intention to use that same bench mark upon construction and it actually developed that they used that same bench mark" (Record 100). It is further substantiated by the report of Sick, resident engineer on the job, to Greeley & Hansen, his superiors and respondent's engineers (Plaintiff's Exhibit No. 25, Record 151, 152, 153; Introduced in Evidence, 124) wherein he stated "that he therefore ordered the sewer grade placed so as to conform to the survey benches" (Record 152). Obviously, he meant the original survey benches of the City Engineer of Danville, Illinois. He further stated therein that "he gave permission to start the sewer in the morning at the lowest grade (top of new sewer invert to match top of old sewer invert) providing the cuts checked within a reasonable amount of the plans" (Record 152). This statement alone shows that the sewer was constructed according to the plans. In addition he stated that "at the time the sewer reached the Main Street tunnel he informed Mr. Nemoyer concerning the change in grade, explaining that they were using survey benches corrected for con-

struction rather than U. S. G. S.” (Record 153). This last statement in his report shows that they were using the original preliminary survey benches corrected for construction established by the City Engineer of Danville, Illinois and were not using U. S. G. S. The Circuit Court of Appeals found the facts as above stated (Record 196, 197, 199). Likewise, it is absolutely untrue as stated in petition that respondent’s engineers directed the sewer to be constructed 1.12 feet lower than shown in the plans. As stated above such a statement is prompted by the inspection made by petitioner’s vice president prior to submitting a bid wherein he used a datum and starting bench mark (U. S. G. S.) therefore which was not the datum and starting bench mark used in the design or in the construction of the sewer and which varied by approximately 1.12 to 1.16 feet from that used in the design and construction.

This is likewise true of the statement made by petitioner that “after the contract had been signed and before construction commenced, the respondent’s engineers discovered that if the sewer was constructed in accordance with plans, it would be dangerously high where it crossed a creek and main sewer and therefore they directed the sewer to be constructed 1.12 feet lower.” This statement is found in the paragraph beginning with the words “Both parties” on page 3 of the petition and at the end of the first paragraph on page 4 of the petition. In making this statement the petitioner refers the Court to Record 152 which is again Sick’s memorandum. Sick made no such statement in the memorandum, but in fact stated that “they could not penalize the contractor and give any deeper cuts than *shown on the plans*, or he would be able to substantiate claims for extras”, that “he was *reluctant to penalize the district by conforming to U. S. G. S. datum as this would raise the sewer a dangerous amount due to the many exposed creek crossings and to the several main*

*sewer crossings * * **," that "he gave permission to start the sewer at the lowest grade providing the *cuts checked within a reasonable amount of the plans*" and that "he informed Nemoyer, explaining that *they were using survey benches corrected for construction rather than U. S. G. S.*" Thus respondent's engineers actually found that if the sewer were constructed in accordance with U. S. G. S. (the wrong datum assumed by petitioner's vice president) it would be dangerously high and likewise, ordered the sewer constructed according to the datum used in the original design and therefore in accordance with the plans and specifications (Circuit Court of Appeals Opinion, Record 198, 199).

Petitioner makes other absolute erroneous statements of fact in its petition. For example; on page 3 wherein it states that "both parties construed the contract as requiring the construction of the sewer at levels calculated from United States Geodetic Survey datum"; in the last paragraph on page 3 where it states that "if petitioner's superintendent inquired of respondent's engineers before the contract was signed what datum was used in the plans they would have informed him that the datum was U. S. G. S. because they themselves thought until after the contract was signed that the sewer would be satisfactorily constructed at the levels shown by the figures on the plans"; on page 3 of the petition wherein it states that "the contract required the sewer to be constructed from a point known as Station 0 plus 00 at a level 550.5 feet *above sea level* and a slope upwards therefrom"; in the last paragraph on page 4 wherein petitioner states that "at no points along the line of the profile were there any figures shown to indicate the height *above sea level* of the surface"; on page 5 in the first paragraph wherein petitioner states that "manholes were shown on the plans and also the *heights above sea level* of the invert at the

places where the manholes were to be constructed"; on page 13 wherein it states that "the figure on the plans fixed the level of the sewer at a certain height *above sea level* and not at a certain depth below the surface of the ground"; in the last sentence on page 13 wherein it states that "the respondent was entitled to have a sewer properly constructed at the height *above sea level* that was prescribed by the figures shown on the plans."

The last above mentioned statements found in the petition must be construed in the light of the fact that *height above sea level* and U. S. G. S. datum are synonymous and one and the same thing. The Circuit Court of Appeals in its Opinion properly found that the plans did not reflect U. S. G. S. datum; that the sewer was not constructed according thereto, and that the sewer was placed in conformity with the plans and the datum used in the plans which was the datum of the City Engineer of Danville, Illinois (Circuit Court of Appeals, Record 198, 199, 200, 201, 202). Likewise, the above statements found throughout the petition for the writ of certiorari are incorrect wherein they baldly assume U. S. G. S. or sea level datum had something to do with the construction of the sewer. Therefore, it is apparent from the finding of fact of the Circuit Court of Appeals that U. S. G. S. or sea level datum had nothing to do with the construction of the sewer, was not intended to be used and was not used (Circuit Court of Appeals Opinion, Record 198, 199; Evidence, Record 92, 100, 101, 102; Plaintiff's Exhibit No. 25, Record 152, 153; Introduced in Evidence 124).

In the last paragraph on page 4 continued on page 5 of the petition, petitioner makes other erroneous statements of fact wherein it states that "on the plans a free hand drawing of the profile of the surface of the ground was shown"; that "not only was the profile of the surface shown as an approximation, but it was impracticable

on account of the smallness of the scale to accurately show what was an approximation of the elevation of the ground," and that "the heights of the manholes were not indicated because the plan was not intended to show accurately the level of the ground."

We will explain hereinafter why these statements are erroneous.

In the last paragraph on page 6 of the petition, petitioner states that "the Circuit Court of Appeals held that the petitioner ascertained, or could have ascertained, when it made its tests that the surface of the ground was 1.12 feet lower than the level shown on the plans as an approximation and that the contract should be construed as requiring the petitioner to construct the sewer at levels approximately 1.12 feet lower than the levels shown by the figures on the plans."

In making such statement the petitioner wants it to appear that the level shown on the plans of the ground surface was U. S. G. S. datum, which it was not, and thus make it appear that the Circuit Court of Appeals misconstrued the contract. As stated before, the 1.12 feet to 1.16 feet was the approximate variation between U. S. G. S. datum (assumed by petitioner's vice president in making his test borings) and the datum of the City Engineer of Danville, Illinois, which was used in the plans and the construction.

Likewise, the last paragraph on page 6 was not the holding as the Court held that petitioner's vice president could have properly ascertained the ground surface elevation at any point along the course of construction from the plans themselves so as to get the proper depth for the test borings (Circuit Court of Appeals Opinion, Record 200), that the sewer was designed and constructed according to the datum of the City Engineer of Danville, Illinois, and therefore, constructed in substantial accordance with

the plans and specifications (Circuit Court of Appeals Opinion, Record 198, 199, 200, 201, 202).

Among other provisions in the contract (Plaintiff's Exhibit No. 2, Record 206; Introduced in Evidence 24) set out in the Opinion of the Circuit Court of Appeals on pages 193 and 194 of the Record are the following: Page 21 of the contract under *Requirements for Bidding and Instruction to Bidders*:

"If any person contemplating a bid for the proposed contract is in doubt as to the true meaning of any part of the plans * * *, he may submit to the engineer a written request for an interpretation thereof * * *. The engineer or owner will not be responsible for any other explanations or interpretations * * *."

Page 90 of the contract under the heading *General Specifications, Contract Drawings*:

"The contractor will not be allowed to take advantage of any error or omission in the drawings, as full instructions will be furnished by the engineer should such error or omission be discovered, and the contractor shall carry out such instructions as if originally specified."

II.

SUMMARY OF THE ARGUMENT.

Point 1. There is no question in this case as to whether or not the figures shown on the plans should take precedence over the scaled distances and dimensions, and likewise, there is not involved any question as to the construction of the contract which is of great public importance. The decision of the Circuit Court of Appeals was based on a question of fact and therefore a writ of certiorari should be denied.

III.

ARGUMENT.

POINT 1.

There Is No Question in This Case as to Whether or Not the Figures Shown on the Plans Should Take Precedence Over the Scaled Distances and Dimensions, and Likewise, There Is Not Involved Any Question as to the Construction of the Contract Which Is of Great Public Importance. The Decision of the Circuit Court of Appeals Was Based on a Question of Fact and Therefore a Writ of Certiorari Should Be Denied.

We wish to here state that the very contentions, the cases cited, and the facts set forth in the petition for writ of certiorari were all presented in almost exactly the same manner to the Circuit Court of Appeals by petitioner in its petition for rehearing in that Court which was denied (Record 204).

On page 8 of the petition for writ of certiorari petitioner states that "in the plans elevations of points along the course of the sewer were shown by figures referable to United States Geodetic Survey datum (U. S. G. S. or sea level)," in substance, the same thing in the paragraph in the middle of page 9 and on page 11 that "to specify the level of the sewer by agreeing upon the height above sea level was the usual and only practical method of contracting for its construction." From the statements above taken out of the petition we believe it permissible to here say that petitioner is attempting to gain a rehearing in the Supreme Court of the United States of a case which was decided adversely to petitioner by the Circuit Court of Appeals on a question of fact. The Circuit Court of Ap-

peals found that U. S. G. S. datum (sea level) had nothing to do with either the ground surface or invert elevation, was not intended, was not used in the plans and was not used in the construction (Circuit Court of Appeals Opinion, Record 198, 199). The direct evidence in support of that finding was uncontradicted (Evidence Record 92, 100, 101, 102; Plaintiff's Exhibit No. 25, Record 152, 153; Introduced in Evidence 124).

Petitioner by making such erroneous statements of fact is saying, although not clearly, that in making test borings, its vice president was only required to give attention to the figures on the plans showing the invert elevation and could ignore the ground surface elevation shown on the plans. Petitioner goes even further by saying that it was not interested in ground surface elevation or depth (Pages 6, 10, 13 of Petition). If such statements were well founded, it would be useless for engineers to obtain survey data prior to designing plans as there would be no use in showing a profile on plans from which depth of test borings could be obtained. Whether a contractor bids on a lineal foot basis, cubic yard basis, etc., he must know the depth of cut to figure his bid from the standpoint of not only excavation, but also water to be encountered and character of soil down to the invert so as to know the pumping required and the amount of bracing necessary for the trench to hold the ground during the construction. Petitioner's vice president when making his tests actually took his own independent ground surface elevation from the U. S. G. S. bench mark without making any reference to the correct ground surface elevation shown on the plans and figured the depth for boring his tests in the manner stated by the Circuit Court of Appeals (Circuit Court of Appeals Opinion, Record 195, 200; Evidence, Record 24). If contractors do not obtain ground surface elevations, they cannot figure their depths for test borings which they must do of necessity.

The plans show invert elevation figures and furnish profile data from which the proper ground surface elevation could have been determined. The difference in elevation between the ground surface and sewer invert (depth of cut) is shown on the plans and is available thereon at any point along the course of construction so that proper depth for test borings could have been obtained from the plans themselves (Circuit Court of Appeals Opinion, Record 200). Thus, the Circuit Court of Appeals found that even if petitioner's vice president had used the wrong datum and applied such datum (U. S. G. S.) in obtaining his independent ground surface elevation in figuring the depth for test borings he could not ignore the proper and correct ground surface elevations which were shown on the plans (Circuit Court of Appeals Opinion, Record 200, 201). Thus in contradiction to the statement on page 5 of the petition, the height of the manholes were shown as the height of the ground surface was shown.

Petitioner here, as in its petition for rehearing in the Circuit Court of Appeals, says that the ground surface shown in the plans was a free hand drawing, was not guaranteed by the contract, was presented as an approximation by the contract and that it was impracticable due to the smallness of the scale to determine the ground surface elevation (Pages 4, 5, 10, 11 and 13 of Petition). As stated above the Circuit Court of Appeals found as a fact that the plans furnished profile data from which ground surface elevation could be determined any place along the line of construction (Circuit Court of Appeals Opinion, Record 200, 201). *Furthermore, there was no evidence presented and likewise, none in the record to the effect that the ground surface shown on the plans was a free hand drawing.* In fact, the plans show the ground surface according to the scale at the right of the profile in accordance with and based upon the preliminary survey and data of the City Engineer of Danville, Illinois, and

is drawn exactly to scale according to that survey. Petitioner's vice president who had had twenty-eight years experience in contracting (Evidence, Record 23) would not have experienced much trouble in determining ground surface elevation and could easily have done so as stated by the Circuit Court of Appeals Opinion, Record 200 and 201, by using his pencil and tearing out a blank page from his field book in which he made his notes while taking the test borings (Plaintiff's Exhibit No. 5, Record 133; Introduced in Evidence, Record 39; Evidence, Record 24). At Station 51 on Sheet 22 of the plans the ground surface can easily be determined. Petitioner's vice president could have torn a small sheet of paper from his field book and placed the smooth edge vertically along the vertical line shown on the profile at Station 51. All he had to do was then place on his sheet of paper a small mark where the top horizontal line of the profile and where the bottom horizontal line of the profile met his paper and at the place where the surface line shown in the profile met his paper. He could then move his paper to the right of the profile and place it along the vertical line at the left of the scale. He would then make the marks on his paper which showed the top horizontal line and the bottom horizontal line of the profile properly conform to the profile at that place. He would make a small mark on his paper at a known elevation in the scale which is 580. He would then compare that mark with the mark he had theretofore placed on his paper showing the surface elevation and find that that mark was two lines up from the elevation 580 which would establish the surface elevation at 582. By this same simple operation he would have found the surface elevation at Station 33 on Sheet 21 of the plans, as another random selection, to be 571.5, and at Station 23, as another random selection, 566. If petitioner's vice president had performed that simple operation he would never have been off more than two tenths of a foot which

as found by the Circuit Court of Appeals is not considered a substantial variance in contracting circles (Circuit Court of Appeals Opinion, Record 200—last paragraph). For the purpose of test borings to determine the amount of water and character of soil at the invert, it is obvious that two tenths of a foot is more than close enough to show what would be encountered in construction. With reference to page 89 of the contract wherein it is provided that the “profiles” rather than “ground surface,” are believed to be reasonably correct but are not guaranteed to be absolutely so and * * * are presented only as an approximation, it must be obvious that in making a survey to obtain data for the design of the plans as was done by the City Engineer of Danville, Illinois, it would not be practical to find the elevation for every inch of ground surface. Likewise, in obtaining such data engineers take elevations to the nearest tenth at very short intervals along the surface of the ground. Therefore, the surface elevation shown in the profile is exact or at least as exact as humanly possible to make it and is shown with reference to the scale at the right of the profile with the same exactness. That provision must, of necessity, be in the contract to protect the owner against what might be termed “trifling suits” based upon exceedingly minor variations and must be construed in the light of the third sentence in the same section of the contract which requires the contractor to satisfy himself regarding the character or amount of peat, clay, sand, quicksand, gravel, glacial drift, hardpan, rock *or other materials* to be encountered and work to be performed. The third sentence in this section of the contract therefore must make it even more obvious that the provision is in the contract in order to protect against such trifling claims as stated above.

In attempting to raise a question which would involve the construction of the contract, petitioner points out the provision in the contract which states that “where figures

are shown on the drawings they shall take precedence over scaled distances and dimensions." This provision does not permit the contractor to ignore the ground surface elevation and look only to the figures showing the invert elevation as if such were the case, there would be no sense of even placing the profile in the plans. Since no figure is shown as to ground surface, it is obvious that the scale to the right of the profile must take precedence and that the contractor should establish his ground surface elevation therefrom in order to obtain the correct depth for test borings. If reference is made to Sheet 21 of the plans, it is obvious that that provision in the contract simply means that Figure 551.7 being the invert elevation shown at Station 7 plus 50, takes precedence over the scale at the right of the profile *as to invert elevation*, but it does not mean that at the same Station which shows a man-hole that the ground surface as determined from the scale at the right of the profile can be ignored if a test boring were to be taken at that point. The scale takes precedence as to ground surface. In other words, the provision means just what it says, that figures take precedence *when shown on the plans*.

On page 14 of the petition petitioner mentions the provision of the contract that "in case of discrepancy in figures or drawings the matter shall be submitted to the engineers without whose decision said discrepancy shall not be adjusted by the contractor save only at his own risk and expense." Petitioner then reasons that if there had been a discrepancy as to ground surface elevation there would have been nothing for the engineer to adjust due to the fact that it was required to put the sewer only at a certain height above sea level (U. S. G. S.) and then states that in fact respondent discovered that the profile of the surface of the ground had been erroneously shown on the plans. The reasoning of petitioner is fallacious due to the fact that the evidence shows and the Circuit Court of Appeals

found that the invert level shown on the plans was not height above sea level or U. S. G. S. and since the depth of cut is shown on the profile, the petitioner cannot therefore ignore the surface elevation (Circuit Court of Appeals Opinion, Record 194, 195, 198, 199, 200, 201). Respondent's engineers did not discover that the profile of the surface of the ground had been erroneously shown on the plans, but discovered that U. S. G. S. datum and the datum of the City Engineer which was used in the plans and in the construction varied. Likewise, if there really was a discrepancy in the surface elevation, there would have been definitely something for the engineers to adjust. Therefore the Circuit Court of Appeals found that petitioner could not ignore the ground surface elevation as its relation to the invert elevation showed the correct cut and depth for test borings.

On page 14 of petition petitioner, here, states that the intercepting sewer was connected to an old sewer and that the elevation of the old sewer was 1.46 feet less than the elevation prescribed for the intercepting sewer at Station 0 plus 00. Those statements are absolutely erroneous. Petitioner's claim that the sewer was lower is not substantiated by the facts but is prompted by the inspection made by petitioner's vice president wherein he used a datum and starting bench mark therefore which was not the datum and starting bench mark used in the design or in the construction and which varied by approximately 1.16 feet from that used in the design and construction. The sewer which petitioner constructed did connect to an old sewer at Station 0 plus 00 and there was some supplementary evidence that petitioner was directed to dig four tenths of a foot more than shown in the plans in order to coincide with the level of the old sewer. Petitioner throughout the trial never made any contention regarding this discrepancy, did not mention it or base any claim thereon in its pleadings (Rec-

ord 2 through 6), did not inform respondent by its pleadings that it made any claim with reference thereto and gave no testimony with reference to damages as a result thereof. Respondent feels at liberty to say that petitioner has never made any serious contention regarding this item. Contractors and engineers in constructing sewers thoroughly expect a variation of that degree as in excavating a trench absolute exactness and precision cannot be reached. As stated in the petition on page 14 thereof, the Circuit Court of Appeals did state (Record 202) as follows:

“Our thought in the matter is that laying the sewer at the invert level of the old sewer structure, constituted substantial compliance with the contract.”

Petitioner fails to also state the reason of the Circuit Court of Appeals for so finding (found in the Opinion, Record 200—last paragraph) as follows:

“When excavation started the plaintiff was directed to dig .4 of a foot more in order to coincide with the level of the old sewer. In this respect the construction varied from the plans. However, a variance of .4 of a foot is not considered unusual or unreasonable in engineering circles, *nor does plaintiff claim this variance to be material. In fact plaintiff does not claim extras for having to dig more than the plans required; admittedly it dug a cut substantially in accordance with the plans.*”

Therefore, petitioner's statement on page 14 that the elevation of the old sewer was 1.46 feet less than the elevation prescribed for the beginning of the new sewer at Station 0 plus 00 is erroneous in that it includes the 1.16 foot variation between the datum plane used in the design and construction and the wrong datum assumed by petitioner's vice president, together with the four tenths of a foot difference above mentioned.

Petitioner throughout its petition is here saying in effect that at Station 0 plus 00 on Sheet 21 of the plans since the invert elevation was shown to be 550.5 that petitioner was required only to construct the sewer at an elevation of

550.5 above sea level (U. S. G. S. datum) and that it could ignore ground surface elevation correctly shown on the profile at that station as 562. The invert elevation 550.5 is an elevation established according to the datum of the City Engineer of Danville (Circuit Court of Appeals Opinion, Record 194, 195, 198, 199; Evidence, Record 92, 102), is not *height above sea level* (U. S. G. S.) and is shown on the plans for the purpose of showing its relation to the ground surface shown on the profile as 562 which was also based on the datum of the City Engineer, the comparison of the two giving the correct depth of the cut and correct depth for test borings. This is true with respect to the plans at any station on the plans for the entire course of construction (Circuit Court of Appeals Opinion, Record 200, 201). In fact, two of respondent's experts testified that the plans were adequate and sufficient to enable one to make a test by which one could accumulate sufficient data for bidding purposes (Record 93, 106). Since the plans showed invert elevation and ground surface elevation at any point along the course of construction and therefore depth for cut and test borings petitioner's vice president could not ignore the data of the profile giving surface elevations and establish an independent ground elevation from a bench mark not used in the plans or construction (U. S. G. S. Datum)—(Circuit Court of Appeals Opinion, Record 201). If petitioner's vice president had established the ground surface elevation from the plans by the simple method we demonstrated herein he would have known at the time he made his test borings that he was using datum which was not used for the design and which was not to be used in construction. Thus ground surface and invert elevation were shown in the plans according to the datum of the City Engineer of Danville, Illinois, the comparison of the two showing the correct depth of cut and the correct depth for test borings at any place along the line of construction and the sewer was constructed according to that datum. The depth was properly shown on

the plans, according to the datum of the City Engineer of Danville, Illinois, that datum was used in the construction, the sewer was placed in the ground according to the depth shown on the plans as a result thereof and therefore was constructed in accordance with the plans and specifications and the contract (Circuit Court of Appeals Opinion, Record 199, 200, 201, 202).

The first question presented by petitioner on page 8 of the petition is based on an absolute erroneous statement of fact. The elevations prescribed by the figures shown at the invert were not U. S. G. S. and the sewer was not constructed at lower elevations than shown in the plans. The case therefore presents no question concerning the construction of the contract and, likewise, no question of great public importance as the Circuit Court of Appeals based its opinion on a finding of fact that the sewer was constructed in substantial conformity with the plans. In apparent support of this question presented, petitioner cites *United States v. Spearin*, 248 U. S. 132 as holding that in this case respondent was held to have warranted that the figures on the plans were accurate. The sewer was constructed, according to the finding of fact of the Circuit Court of Appeals, at the depth provided by the plans shown correctly therein. The ground surface elevation was shown on the plans correctly as were also the figures showing the invert. In fact, there is no evidence in the record that either were incorrect. There is no question in the case regarding a breach of warranty, express or implied, as the sewer was constructed in substantial conformity with the plans and therefore *United States v. Spearin*, 248 U. S. 132, is inapplicable.

The second question presented on page 9 of the petition is also based upon and includes therein an absolute erroneous statement of fact. As shown above the engineers did not discover that if the sewer was constructed at the eleva-

tion prescribed by the figures on the plans it would be dangerously high, but, in fact, discovered that if it was not constructed according to the figures shown on the plans, that would be the case. They discovered that U. S. G. S. datum (the wrong datum) would raise the sewer. Likewise, they used the datum of the plans, constructed the sewer according to the plans and did *not* direct that it be constructed at lower elevations than were prescribed in the plans (Circuit Court of Appeals, Record 198, 199, 200, 201, 202). That question, therefore, is based on a statement of facts which was not so found by the Circuit Court of Appeals and there is involved therein no question as to the construction of the contract or any question which is of great public importance. In connection with the second question presented by petitioner it cites *City of Wheeling v. Casey*, 74 Fed. 2d. 794 (C. C. A. 4). That case is no authority in this case due to the fact that in that case there was an absolute change by mistake of an engineer in the entire project which shifted the site thereof over twenty-one feet. The suit was brought to recover damages for the additional costs incurred in constructing the project on the mistaken location instead of on the location as shown on the original plans and specifications. The contract gave the engineer in that case the option of changing the location and provided such changes would be adjusted on the basis of additional or decreased costs of the work. The Court found that by the inadvertent mistake, the engineer changed the location and the Court entered judgment accordingly. In our case the sewer is placed in conformity with the original plans and specifications. There was no mistake made and there was no change in the plans. That case is entirely therefore different from our case on the facts and is inapplicable.

Counsel for respondent begs the Court's indulgence in its consideration of this answer to the petition for writ of cer-

tiorari. We have been conscious of this Court's rule regarding answers in proceedings of this nature which require such to be brief, concise and to avoid repetition. While keeping this rule in mind it has been difficult to "hew to the line" of this rule and at the same time present the matter in compliance with the principles upon which we rely for the denial of the writ of certiorari as announced in *Southern Power Co. v. North Carolina Public Service Co.*, 263 U. S. 508 at 509 as follows:

"The petition therefore stated that the cause involved a great question of vital importance to the public, . . .

The argument developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use,—*primarily a question of fact*. That is not the ground upon which we granted the petition, and, if sufficiently developed, would not have moved us thereto.

Heretofore we have pointed out the necessity for clear, definite and complete disclosures concerning the controversy when applying for certiorari."

The same principle is announced in *Furness, Withy & Co. v. Yanz-Tsze Ins. Co. Asso.*, 242 U. S. 430 at 433, and in *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U. S. 387 at 392 and 393.

This Court in *Magnum Import Co. v. Coty*, 262 U. S. 159 at 163 announced another principle with reference to certiorari as follows:

"The jurisdiction to bring up cases of certiorari from the Circuit Court of Appeals was given for two purposes: First, to secure uniformity of decision between those Courts in the nine circuits; and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

We submit therefore that there is not in this case as stated in the petition a question of importance which is in

the public interest to have decided by this Court. We further submit that the opinion of the Circuit Court of Appeals was based on a question of fact.

Respondent therefore respectfully prays that the writ of certiorari be denied.

Respectfully submitted,

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